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February 7, 1997

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

96-261

**Re: Telefónica Internacional de España, S.A.'s Comments In The
Matter Of International Settlement Rates (IB Docket No. 96-26)**

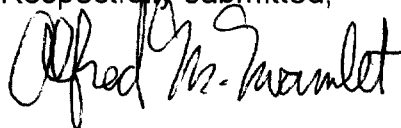
Dear Mr. Caton:

Telefónica Internacional de España, S.A. ("TI"), by its attorneys, hereby submits for filing an original and five copies of their Comments in connection with the above-captioned matter.

Also enclosed is an additional copy of TI's Comments which we ask you to date stamp and return with our messenger.

If you have any questions, please do not hesitate to contact me.

Respectfully submitted,



Alfred M. Mamlet
Counsel for Telefónica Internacional
de España, S.A.

/srh-m
Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of

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**COMMENTS OF TELEFÓNICA
INTERNACIONAL DE ESPAÑA, S.A.**

**TELEFÓNICA INTERNACIONAL
DE ESPAÑA, S.A.**

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TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY AND INTRODUCTION	1
II. THE COMMUNICATIONS ACT AND THE TREATY OBLIGATIONS OF THE UNITED STATES GOVERNMENT BAR THE COMMISSION FROM REQUIRING FOREIGN CARRIERS TO SETTLE AT COMMISSION-MANDATED SETTLEMENT RATES	5
A. The Commission Lacks The Authority Under The Communications Act To Require Foreign Carriers To Settle At Commission-Mandated Settlement Rates	6
1. The NPRM Impermissibly Proposes To Regulate Foreign Carriers By Controlling And Altering Their International Settlement Practices	6
2. The Communications Act Does Not Grant The Commission Any Jurisdiction To Regulate Foreign Carriers Or To Require Them To Settle At Commission-Mandated Rates	10
a. Section 2(a) Of The Communications Act Denies The Commission Jurisdiction Over Foreign Carriers Who Do Not Engage In Foreign Communications Within The United States	11
b. The Communications Act Does Not Grant The Commission Any Statutory Authority To Determine The Validity Of International Settlement Contracts Between U.S. And Foreign Carriers	12
(1) The U.S. Supreme Court Has Held That The Commission Has No Authority To Determine The Validity Of Contracts Between Holders Of Commission Authorizations And Third Parties	14
(2) The <u>RCA Settlements Case</u> Does Not Support The NPRM's Assertion Of Authority To Require Foreign Carriers To Settle At Commission-Mandated Rates	15
B. The NPRM's Proposals Violate The Regulations And Convention Of The International Telecommunications Union	16
1. The NPRM's Proposals Violate The ITU Regulations' Cornerstone Requirement That International Settlement Rates Be Determined And Settled According To Mutual Agreement Between Carriers	18

	<u>Page</u>
2. The NPRM's Proposals Violate The Prompt Payment Requirements Of The ITU Regulations	19
3. As A Unilateral Attempt To Resolve A Dispute Over International Settlement Rates, The NPRM Violates The Dispute Resolution Provisions Of The ITU Convention	20
C. The NPRM's Proposals Would Expose The United States To International Claims For Compensation And Dispute Arbitration Under Numerous Treaties And International Law	21
III. THE COMMISSION SHOULD REQUIRE COST-BASED INTERNATIONAL COLLECTION RATES BEFORE IT REQUIRES COST-BASED SETTLEMENT RATES	24
A. U.S. Carriers Enjoy High Price-Cost Margins On International Collection Rates	25
B. The FCC Must Impose Cost-Based Rates On U.S. Carriers Before Attempting To Do So On Foreign Carriers	29
IV. THE UNITED STATES SHOULD RELY ON BILATERAL AND MULTILATERAL PROCESSES TO REDUCE SETTLEMENT RATES	32
A. Multilateral Efforts And Market Forces Are Working To Bring Down Settlement Rates	33
B. The Success Of Market Trends And International Efforts Makes Unilateral Action Unnecessary	35
C. The Commission Should Pursue Settlement Rate Reform Through The WTO And The ITU	36
D. The Commission's Proposal Does Not Address The Real Causes Of The Rising Settlement Imbalance	37
V. ANY MANDATORY REDUCTIONS IN SETTLEMENT RATES SHOULD BE TIED TO RATE REBALANCING	40
A. Significant Telephone Rate Rebalancing Is Necessary In Most Countries To Permit Substantial Decreases In Settlement Rates	41
B. Foreign Carriers Have Strong Commercial Incentives To Rebalance Their Rates	45
C. Any FCC Push To Reduce Settlement Rates Should Be Tied To Rate Rebalancing	46

	<u>Page</u>
VI. THE COMMISSION'S METHODOLOGY FOR DETERMINING ITS PROPOSED BENCHMARKS IS INCOMPLETE, INACCURATE AND INEQUITABLE	43
A. The FCC's Methodology Does Not Fully Or Accurately Reflect The Costs Of Providing International Service	43
1. The FCC's Methodology Fails To Include The Costs Of Providing Universal Service	50
2. The FCC's Methodology Does Not Accurately Reflect The Costs Of Providing International Service	55
3. The Commission's Methodology Is Based On A Number Of Faulty Assumptions	57
a. The FCC Cannot Reasonably Use Private Circuit Prices As A Proxy For Switched Traffic Prices	57
b. The FCC's Assumption That A 4:1 Multiplication Factor Is Appropriate For All Carriers Is Wrong	58
c. The FCC's Assumption Of 8,000 Minutes Per Circuit Per Month Inaccurately Reflects Usage On Developing Country Routes	59
B. The FCC's Methodology Skews The Benchmarks Against Most Foreign Countries	59
VII. THE NPRM TRANSITION SCHEDULE IS OVERLY BURDENSOME AND INTRUSIVE	63
VIII. THE COMMISSION SHOULD NOT APPLY ANY BENCHMARKS TO COUNTRIES COMMITTED TO COMPETITIVE REFORM	66
A. The Commission Should Not Apply Benchmarks To Countries Which Satisfy The ECO Test	67
B. The Commission Should Not Condition The Authorizations Of Foreign-Affiliated Carriers On Settlement Rates Within The Commission's Proposed Benchmarks	70
C. The Commission Should Not Apply Benchmarks To Developing Countries That Have Set A Date Certain For Introducing Competition	70
IX. CONCLUSION	72

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

**In the Matter of

International Settlement Rates**

96-261
IB Docket No. 96-26

**COMMENTS OF TELEFÓNICA
INTERNACIONAL DE ESPAÑA, S.A.**

I. SUMMARY AND INTRODUCTION

Telefónica Internacional de España, S.A. ("Telefónica Internacional"), hereby comments on the NPRM's suggestions to reform the international settlement rate system.^{1/} While Telefónica Internacional agrees with the International Telecommunications Union ("ITU") and the Commission that international settlement rates should continue to decrease, the unilateral approach promoted by AT&T and suggested in the NPRM is simply not acceptable.

It is clear why AT&T has pushed the Commission to issue the NPRM.^{2/} AT&T has reaped enormous profits from international services as settlement rates have

^{1/} See International Settlement Rates; Notice of Proposed Rulemaking, FCC 96-484 (rel. Dec. 19, 1996) ("NPRM").

^{2/} See, e.g., Letter from Judy Arenstein, Vice President-Government Affairs, AT&T, to William Caton, FCC Acting Secretary, Regulation of International Accounting Rates, CC Docket No. 90-337, Phase II (filed Dec. 5, 1996) (asking Commission to propose "TSLRIC methodology," and asking Commission to "[i]ssue the Benchmark NPRM with comments and replies due before 2/15/97 so that you can indicate to the U.S. carriers where you believe you will come out in an Order").

declined 48% since 1987. Indeed, for U.S.-originated calls, AT&T's average \$0.55 per-minute margin above incremental cost is almost twice as large as the \$0.29 per-minute average margin for foreign carriers. AT&T hopes that the Commission will turn a blind eye to this critical fact, and instead focus only on the foreign carriers' much smaller margins.

The AT&T proposals are riddled with difficult legal, economic, and policy problems. **First**, the proposals to take "enforcement action" against foreign carriers violate U.S. and international law (Part II). In terms of U.S. law, Section 2(b) of the Communications Act of 1934 (the "Communications Act") expressly denies the Commission jurisdiction over foreign carriers engaged in communication in the United States "solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier."^{3/} Further, the Commission does not have the power to invalidate the contractual settlement rate agreements between U.S. carriers and their foreign correspondents. The U.S. Supreme Court's decision in Regents of University System of Georgia v. United States clearly told the Commission that "[W]e do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others."^{4/}

In terms of international law, the United States has ratified binding international treaties which provide that settlement rates shall be established by mutual agreement between the carriers. Indeed, the proposed enforcement actions would subject the U.S. Government to binding arbitrations that could include compensation claims.

^{3/} 47 U.S.C. § 152(b)(2).

^{4/} 338 U.S. 586, 602 (1950).

Second, if the Commission's goal is to benefit U.S. consumers through lower collection rates rather than to line AT&T's pockets, then the NPRM has focused on the wrong end of the call. AT&T and other U.S. carriers enjoy an average margin of \$0.55 per minute on outbound international calls, almost twice the average margin of \$0.29 per minute that foreign carriers have. If the Commission believes that the U.S. outbound market is competitive, then no action against foreign carriers is warranted because the margin of foreign carriers is only about one-half of the margin of U.S. carriers. If the Commission believes that the U.S. outbound market is not competitive, then it should focus first on reducing the margins of the U.S. carriers before taking unilateral action against foreign carriers (Part III).

Third, AT&T would have the Commission usurp bilateral and multilateral processes for reforming international settlement rates in spite of their significant success in lowering international settlement rates. Since the average U.S. settlement rate has fallen 48% since 1987, AT&T cannot blame the level of these rates for increasing the U.S. settlements imbalance. Indeed, increasing competition and multilateral cooperation should be credited with cutting settlement rates nearly in half so far, and there is good reason to expect that further cuts will be made in the future. The world is on the verge of a successful World Trade Organization ("WTO") agreement which will increase competition in international services, putting additional downward pressure on settlement rates. The ITU is working hard on further multilateral settlement rate reform. And the Commission's recent Flexibility Order will encourage lower settlement rates in this increasingly competitive environment. The Commission should allow the market to function, and should continue to work with others on a multilateral basis to achieve settlement rate reform (Part IV).

Fourth, if the Commission decides to approach settlement rate reform on a unilateral basis, then it must tie settlement rate reductions to rate rebalancing. Most

countries, including the United States, have a complex, delicate, and interrelated system of telephone rates for local, domestic long distance, and international services. National governments design these rate systems to promote not only efficiency, but infrastructure development and universal service as well. Most international carriers, including those in the Telefónica Group,^{5/} are pressing their national governments to adopt and implement aggressive rate rebalancing plans so that they can become more competitive. There are, however, significant political obstacles to rate rebalancing in most countries. Tying settlement rate reductions to broader rate rebalancing would fit with the economic, political, and regulatory realities in foreign countries, and would align the Commission's goal of lower settlement rates with the foreign carriers' economic imperative of rate rebalancing (Part V).

Fifth, the NPRM's methodology for proposed benchmarks is flawed because it does not measure costs fully, fairly or accurately (Part VI). AT&T's incremental cost methodology completely ignores the substantial costs for provision of universal service, which the Organization for Economic Cooperation and Development ("OECD") recognizes as one of the four cost categories for terminating international calls. Then, lacking hard data on the actual costs of foreign carriers, the NPRM uses the data it can find. It relies on prices that are clearly below cost, makes a number of assumptions that are dubious when applied to large parts of the world, and does not account for the significantly greater political and economic risks of building telephone networks in Lima, Peru, than in London, England. Finally, by failing to make the necessary purchasing parity power adjustment, the NPRM significantly underestimates the costs in developing countries.

^{5/} For purposes of these Comments, the "Telefónica Group" includes Telefónica de España, Compañía Teléfonos de Chile ("CTC"), Telefónica del Perú and Telefónica Argentina.

Sixth, the proposed transition schedule is not realistic (Part VII). The United States has taken fifteen years to develop the "limited competition"^{6/} it now enjoys. Still, the Commission's proposal to require local exchange carriers to price at incremental cost has led to enormous divisions within the telecommunications industry and may well be overturned by the courts. Nevertheless, the NPRM would have countries from Germany to Guatemala and from Japan to Peru move to incremental cost in as little as two years. Instead, any realistic plan for significant settlement rate reform must be tied to rate rebalancing.

Seventh, the Commission should not apply benchmarks to countries that are committed to competitive reform. Competition -- not a unilateral, extraterritorial decree -- should establish the settlement rates in these countries (Part VIII).

II. THE COMMUNICATIONS ACT AND THE TREATY OBLIGATIONS OF THE UNITED STATES GOVERNMENT BAR THE COMMISSION FROM REQUIRING FOREIGN CARRIERS TO SETTLE AT COMMISSION-MANDATED SETTLEMENT RATES

The Commission lacks the legal authority to adopt AT&T's proposals to control the international settlement practices of foreign carriers for three essential reasons. **First**, the Communications Act denies the Commission jurisdiction to enforce Commission-mandated settlement rates on foreign carriers. **Second**, the binding Convention and Regulations of the International Telecommunications Union provide that international settlement rates shall be established only by the mutual agreement of U.S. and foreign carriers -- not by unilateral actions of the U.S. Government. **Third**, the enforcement proposals to control foreign carriers' international settlement practices

^{6/} NPRM ¶ 9.

would constitute unlawful expropriations, subjecting the U.S. Government to compensation claims and arbitral proceedings under a myriad of treaties.^{7/}

A. The Commission Lacks The Authority Under The Communications Act To Require Foreign Carriers To Settle At Commission-Mandated Settlement Rates

The Commission has proposed to regulate the settlement rates of foreign carriers even though the Communications Act grants it no authority to do so. The NPRM's proposals, if adopted, would regulate foreign carriers by effectively controlling and altering the settlement rate decisions and prices of foreign carriers as well as the policy decisions of the foreign countries in which those carriers operate. The Communications Act, however, does not grant the Commission any regulatory jurisdiction over foreign carriers. Nor does it grant the Commission any statutory authority to determine the validity of contracts between regulated service providers and third parties.

1. The NPRM Impermissibly Proposes To Regulate Foreign Carriers By Controlling And Altering Their International Settlement Practices

The NPRM defends, and seeks comment on the assertion of regulatory jurisdiction, stating that:

the measures we propose here are intended to fulfill our statutory mandate to ensure reasonable telephone rates. These measures are directed at U.S. carriers and the settlement rates they pay to foreign carriers.^{8/}

^{7/} In addition, the proposals in the NPRM may violate the U.S. national treatment and most-favored nation treatment obligations under the General Agreement on Trade in Services ("GATS"). Since these obligations may be clearer following conclusion of the WTO Group on Basic Telecom negotiations on February 15, 1997, Telefónica Internacional reserves the right to comment on these issues in the Reply Comments.

^{8/} NPRM ¶ 19.

Yet the NPRM's proposals clearly are directed at foreign carriers and, in fact, propose to assert regulatory jurisdiction over foreign carriers.

"Regulate" means "[t]o control or direct according to rule, principle, or law" or "[t]o adjust to a particular specification or requirement."^{9/} If adopted, the NPRM would regulate foreign carriers at three levels: enforcement; investigation; and policy.

First, the NPRM proposes to take enforcement actions against foreign carriers by:

- Requiring foreign carriers to comply with unilaterally established benchmarks;^{10/}
- Demanding that foreign carriers comply with the benchmarks according to Commission-imposed deadlines;^{11/}
- Targeting for enforcement actions those foreign carriers that fail to comply with Commission-imposed benchmarks;^{12/}
- Permitting U.S. carriers to breach their settlement rate agreements with foreign carriers and to settle only at rates and terms approved by the Commission;^{13/}

^{9/} American Heritage Dictionary 1521 (3d ed. 1992).

^{10/} NPRM ¶ 63 (proposing to "require that settlement rates [between U.S. and foreign carriers] . . . be at or below our benchmarks" within the time period specified by the Commission).

^{11/} Id. (proposing deadlines of one to two year for foreign carriers from high-income countries, two to three years for the two categories of middle-income countries, four to five years for low-income countries, starting from the effective date of the Commission's order in this proceeding).

^{12/} Id. ¶ 87 (proposing to "identify foreign carriers that are reluctant to engage in meaningful progress toward negotiating settlement rates at or below the relevant benchmark").

^{13/} Id. ¶ 89 (proposing breaches of existing accounting rate agreements in favor of: agreements with "fixed expiration date[s]"; rates "no higher than transition rate goals"; and rates "at or below the benchmark rate").

- Allowing U.S. carriers to boycott foreign carriers that reduce service to U.S. carriers who illegally withhold contractually required payments to those foreign carriers;^{14/} and
- Imposing retroactive settlement rates on foreign carriers and require that they provide refunds for prior periods.^{15/}

These enforcement proposals are clearly designed: (1) to change the behavior of the foreign carriers to conform to rules established unilaterally by the Commission; (2) to identify foreign carriers that fail to conform with the rules; and (3) to inflict economic sanctions on foreign carriers in order to obtain compliance with the rules. By contrast, U.S. international carriers are the intended beneficiaries of the proposed rules, which would "require" them to pay less to foreign carriers.

Second, the NPRM proposes to investigate the settlement practices, prices, and costs of foreign carriers as well as the competitive conditions and economic development of the countries in which they operate. The NPRM proposes to:

- Establish mandatory benchmarks for the "reasonable termination costs" of foreign carriers;^{16/}
- Examine the components of foreign carriers' costs;^{17/} and
- Establish mandatory benchmarks for foreign countries and their respective foreign carriers according to (1) economic development, or (2) country-specific characteristics.^{18/}

^{14/} Id. ¶ 90 n.84 (citing such action taken in accounting rate dispute with Telecomunicaciones Internacionales de Argentina Telintar).

^{15/} Id. (citing such actions taking in accounting rate disputes with Telefónica del Perú, S.A., and Empresa Nacional de Telecomunicaciones, S.A., of Bolivia).

^{16/} Id. ¶¶ 31, 32 (proposing a total long-run incremental cost ("TSLRIC") methodology to approximate interconnection charges).

^{17/} Id. ¶ 37 (detailing the international facility, international gateway, and national extension components of foreign carriers' costs).

^{18/} Id. ¶¶ 39-57.

These proposals reveal that foreign carriers, and not U.S. carriers, are the real target of the NPRM. The fact that AT&T has urged the Commission to impose this regulation on foreign carriers only underscores this fact. The NPRM proposes to change the behavior of foreign carriers based on their particular characteristics.

Third, the NPRM would impose a unilateral set of policy choices on foreign carriers and governments. The proposals would:

- Limit foreign carriers' earnings from international settlement payments to mere recovery of traffic termination costs;^{19/}
- Favor Commission notions of economic efficiency over other objectives, such as universal service and infrastructure development;^{20/}
- Impose the Commission's view of proper business strategies on foreign carriers;^{21/} and
- Necessitate political and regulatory reforms of the foreign countries in which foreign carriers operate.^{22/}

By imposing these policy choices, the NPRM would interfere with the private business decisions of foreign carriers and the policy decisions of the governments in countries

^{19/} NPRM ¶ 42 ("benchmarks based on tariffed components prices will fully compensate foreign carriers for the costs they incur in terminating international traffic"); id. at ¶ 34 ("We recognize that foreign carriers should be able to charge a reasonable price for terminating U.S.-originated calls, but settlement rates appear in most instances to be well in excess of any estimate of reasonable termination costs.").

^{20/} Id. ¶ 59 (conceding that there is an argument that "substantially above-cost settlement rates are justified because they are used to subsidize network development in lower income countries"); id. ¶¶ 31, 32 (proposing the TSLRIC methodology, which approximates interconnection charges in competitive markets).

^{21/} Id. ¶ 59 (recommending that foreign countries pursue economic growth by "[b]ringing settlement payments closer to cost . . . to lower calling prices. Lower calling prices will in turn stimulate traffic flows.").

^{22/} Id. ¶ 24 (recognizing that "many countries will need time to adjust to more cost-based settlement rates"); id. ¶ 61 (recognizing that "countries will need time to make the adjustments necessary to introduce competitive reforms").

where they operate. The NPRM also fails to account for other legitimate objectives that foreign carriers, foreign governments and the Organization for Economic Cooperation and Development ("OECD") may wish to pursue, such as universal service. Most importantly, the NPRM fails to recognize that the choice of telecommunications policy objectives in other countries is ultimately not for the U.S. Government to make.

2. The Communications Act Does Not Grant The Commission Any Jurisdiction To Regulate Foreign Carriers Or To Require Them To Settle At Commission-Mandated Rates

The Communications Act does not grant the Commission jurisdiction to regulate foreign carriers or impose settlement rates on them. The Commission's jurisdiction over interstate and foreign communications and providers thereof is defined by Section 2 of the Communications Act.^{23/} It does not include any authority to regulate foreign carriers or control their international settlement practices. The Executive Branch has previously acknowledged this fact.

Foreign governments and their telecommunications administrations . . . maintain independent sovereign authority over the foreign end of a call. **Because the Commission cannot compel foreign entities to accept settlement rates prescribed by the Commission for U.S. carriers, there are practical limits to the usefulness of the Commission's prescription authority.**^{24/}

^{23/} See Northwestern Telephone Systems, Inc., Memorandum Opinion, Order and Certificate, 5 FCC Rcd 876, 877 (1990) ("Section 2(a) of the Act sets forth the Commission's jurisdiction over communication services, i.e., the regulation of interstate and foreign communications."); National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 425 (D.C. Cir. 1989) (Section 2 defines and "divides the [Commission's] regulatory jurisdiction over wire and radio communication into distinct interstate and intrastate spheres.").

^{24/} Comments of the National Telecommunications and Information Administration, at 17, Regulation of International Accounting Rates, CC Docket No. 90-337 (filed Oct. 12, 1990) (emphasis added).

The NPRM, however, sidesteps the issue of jurisdiction over foreign carriers. **First**, as discussed above, the NPRM styles its proposals as being directed at U.S. carriers, when in fact they are explicitly targeted at foreign carriers. **Second**, the NPRM argues that the specific powers granted to the Commission allow it to determine the validity of international settlement contracts between U.S. and foreign carriers. The U.S. Supreme Court, however, has found that the Commission has no statutory authority to determine the validity of contracts between holders of Commission authorizations and third parties.

a. Section 2(a) Of The Communications Act Denies The Commission Jurisdiction Over Foreign Carriers Who Do Not Engage In Foreign Communications Within The United States

Section 2(a) of the Communications Act grants the Commission the authority to regulate "all interstate and foreign communication by wire or radio . . . which originates and/or is received within the United States, and to all persons engaged within the United States in such communication. . . ."^{25/} Foreign carriers neither originate nor receive interstate or foreign communications by wire or radio "within the United States."

Indeed, Section 2(b) of the Communications Act specifically denies the Commission jurisdiction over foreign carriers engaged in communication in the United States "solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier."^{26/} The Commission therefore lacks any authority to regulate

^{25/} 47 U.S.C. § 152(a). Section 3(17) of the Communications Act defines "foreign communication" as "communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States." 47 U.S.C. § 153(f).

^{26/} 47 U.S.C. § 152(b)(2).

foreign carriers that receive U.S.-originated calls from interconnected U.S. carriers and that terminate the calls in a foreign country.

The Commission has previously acknowledged that it lacks jurisdiction over foreign carriers and may not regulate them. In the RCA Telex Case,^{27/} the Commission considered whether it had jurisdiction over foreign entities that originated telex traffic from Belgium and Guatemala. Traffic that reached an initial busy signal was stored on RCA facilities in New York and delivered at a later time. The Commission concluded:

[w]hile **we do not have jurisdiction over the foreign entities** involved in [originating telex traffic], we do have jurisdiction over the manner in which our carriers participate in it, just as we do with respect to any delivery practice or communications facility used to effectuate delivery.^{28/}

The Commission therefore admitted that while it could assert jurisdiction over the U.S. carrier terminating telex traffic originating outside the United States, it lacked jurisdiction over the foreign carriers themselves.

b. The Communications Act Does Not Grant The Commission Any Statutory Authority To Determine The Validity Of International Settlement Contracts Between U.S. And Foreign Carriers

The Communications Act grants the Commission no statutory authority to impose international settlement rates on foreign carriers, or to compel breaches of existing settlement rate agreements. The U.S. Supreme Court has already determined that the Commission has no power under the Communications Act to determine the

^{27/} RCA Global Communications, Inc., 40 FCC 2d 616 (1973) ("RCA Telex Case").

^{28/} Id. at 617 (emphasis added).

validity of contracts between holders of Commission authorizations and third parties.^{29/}

The NPRM's claims that the Commission has the authority to adopt the proposals under Sections 1, 2, 3(17), 4(i), 201, 202, 205, and 303(r) of the Communications Act and under a single district court decision from 1942 are therefore baseless.^{30/}

^{29/} The Commission has very limited powers to take enforcement actions against non-licensees. See Section 303(m) of the Communications Act of 1934, 47 U.S.C. § 303(m); Hearings Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong. 14, 51 (1947) (statement of Charles R. Denney, FCC Chairman) (admitting that the Commission lacks the power to issue or enforce cease and desist orders against non-licensees).

^{30/} NPRM ¶ 19 & n.22. Sections 4(i) and 303(r) grant the Commission residual powers to perform its statutory functions, but they do not define or expand the Commission's jurisdiction. See Regents of University System of Georgia v. Carroll, 338 U.S. 586, 600 (1950) (finding that Section 303(r) merely enabled the Commission to carry out its jurisdictional responsibilities for broadcast regulation and did not permit the Commission to condition an applicant's responsibilities to a third party). Section 4(i) language is nearly identical to that of Section 303(r). Sections 201, 202, and 205 grant the Commission the power to regulate services, charges, discrimination, and preferences for communications and communications providers within its jurisdiction, which is defined elsewhere. See GTE Service Corp. v. FCC, 474 F.2d 724, 734 & n.15 (2d Cir. 1973) (finding that Sections 201, 202, and 205 do not define the Commission's jurisdiction but "simply authorize[] the Commission to prescribe just, fair and reasonable charges, regulations and practices for a carrier" subject to its jurisdiction). Section 1 merely establishes the Commission without specifying its jurisdiction; its discussion of purposes is otherwise precatory and aspirational. Cf. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (finding that the Preamble to the U.S. Constitution "has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted.").

(1) The U.S. Supreme Court Has Held That The Commission Has No Authority To Determine The Validity Of Contracts Between Holders Of Commission Authorizations And Third Parties

In Regents v. Carroll,^{31/} the Court considered whether or not the Commission's renewal of a radio station license subject to a condition requiring the licensee to repudiate a management contract barred recovery against the licensee for breach of contract. The Court held that the Commission's order did not insulate the licensee from contract liability to a third party.^{32/}

The Court found that although Section 303(r) allows the Commission to impose conditions "necessary to carry out the provisions" of the Communications Act, "the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant."^{33/} The Court recognized the difficult policy choices confronting the Commission -- either: (1) renew the license and violate the law involved with the management contract; (2) deny the license renewal; or (3) somehow "obtain[] from both parties to a contract clear and unequivocal assent to its cancellation."^{34/} The Court expressly ruled out a fourth option. "We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others."^{35/}

Like the third party who contracted with the licensee seeking renewal in Carroll, foreign carriers have contracted with authorized U.S. carriers for determining international settlement payments. Because it lacks the power to invalidate contracts

^{31/} 338 U.S. 586.

^{32/} Id. at 600-02.

^{33/} Id. at 602.

^{34/} Id. at 601.

^{35/} Id. at 602.

with foreign carriers, the Commission must choose one of three options: (1) to accept that U.S. and foreign carriers have valid contracts (perhaps at rates which the Commission finds objectionable); (2) to require U.S. carriers to absorb the difference between settlement rates and acceptable charges that may be passed on to U.S. consumers; or (3) to persuade U.S. and foreign carriers to consent to mutual cancellations (or revisions) of the contracts.

Carroll makes clear that a U.S. carrier which breaches an accounting rate agreement with a foreign carrier is liable for contract damages. Moreover, a foreign carrier may legitimately mitigate damages by reducing available circuits to a U.S. carrier that violates its contractual obligations.

**(2) The RCA Settlements Case Does Not Support
The NPRM's Assertion Of Authority To
Require Foreign Carriers To Settle At
Commission-Mandated Rates**

The lone judicial authority cited in support of the NPRM's claim of statutory authority -- the RCA Settlements Case^{36/} -- does not permit the Commission to require foreign carriers to settle at Commission-mandated rates, particularly when read in the context of the U.S. Supreme Court's subsequent decision in Carroll. The district court found, under Section 2(a), that the Commission had jurisdiction to regulate the rates that RCA charged to U.S. consumers and businesses.^{37/} As in the Carroll decision, however, the district court made clear that the Commission's regulatory

^{36/} RCA Communications, Inc. v. United States, 43 F. Supp. 851 (S.D. N.Y. 1942) ("RCA Settlements Case") (involving a U.S. carrier's challenge to the Commission's jurisdiction to regulate that carrier's rates for urgent telegram messages being sent to or from the United States).

^{37/} Id. at 854-55.

authority does not include the power to eliminate liability for breach of contract between holders of Commission authorizations and third parties.^{38/}

More importantly, the international legal regime governing international settlement rates at the time of the RCA Settlements Case differs starkly from the one that presently governs international settlement rates. In 1942, the United States did not abide by the ITU Telegraph Regulations governing urgent message rates because it was not a party to the treaty adopting them.^{39/} By contrast, the United States is presently a member of the International Telecommunications Union ("ITU") and a party to both the ITU Convention and ITU Regulations (1988).^{40/} As discussed below, these agreements provide for and protect carrier-to-carrier agreements for the determination of international settlement rates.

B. The NPRM's Proposals Violate The Regulations And Convention Of The International Telecommunications Union

The NPRM proposes to determine international settlement rates and the validity of ITU-sanctioned carrier-to-carrier contracts in violation of the ITU Regulations and Convention, which are binding on the United States as a party to both agreements. "[T]he 1982 [ITU] Convention . . . binds the United States as a matter of both

^{38/} Id. at 855 (noting that observance of the Commission's rate cap "will make it necessary for the [U.S. carrier], if it cannot secure an amendment of the existing agreements, either to break its contracts for foreign messages or to bear the loss on outgoing messages itself.").

^{39/} Id. (noting that the United States was not a party to the ITU Telegraph Regulations adopted at the International Telecommunication Conferences at Madrid and Cairo in 1932 and 1938).

^{40/} International Telecommunication Convention, done at Nairobi, Nov. 6, 1982, S. Treaty Doc. No. 99-6 (1985) (entered into force for the United States definitively Jan. 10, 1986) ("ITU Convention"); International Telecommunication Regulations: Telephone and Telegraph Regulations, done at Melbourne, Dec. 9, 1988, S. Treaty Doc. No 102-13 (1991) (entered into force for the United State definitively Apr. 6, 1993) ("ITU Regulations").

international and domestic law.^{41/} Because the Senate has given its advice and consent to, and the President has ratified, both the ITU Regulations and Convention, these treaties are the supreme law of the United States.^{42/}

The NPRM would violate three international obligations of the United States imposed by the ITU Convention and the equally binding ITU Regulations.^{43/} **First**, the ITU Regulations provide that international settlement rates will be determined and settled by mutual agreement between carriers. **Second**, the ITU Regulations further provide for the prompt payment of account balances pursuant to carrier-to-carrier agreements, regardless of disputes, thus precluding the leveraging of overdue payments to extract contractual or policy changes. **Third**, the ITU Convention provides that any dispute regarding international settlement rates be resolved according to a mutually agreed method and not by unilateral action.

^{41/} In the Matter of VIA USA, Inc., Order on Reconsideration, 10 FCC Rcd 9540, 9550 n.44 (1995).

^{42/} Id. at 9551 n.49 (further noting that "Article 42(1) of [the ITU] Convention expressly identifies ITU Administrative Regulations as constituting part of the binding international obligations imposed by Article 2."); see also Restatement (Third) of the Foreign Relations Law of the United States § 111(1) (1987) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."). While labeled as a "Convention" and "Regulations," the ITU Convention and Regulations are both binding treaties.

^{43/} To the extent the ITU Convention and Regulations conflict with the Communications Act of 1934, they supersede the Act because they are more recent. See Whitney v. Robertson, 124 U.S. 190, 194 (1888) (where a treaty and an act of legislation are inconsistent, "the one last in date will control" the other); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870) ("A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.") (footnotes omitted); Restatement (Third) of the Foreign Relations Law of the United States § 115(2) ("A provision of a treaty of the United States that becomes effective as the law of the United States supersedes as domestic law any inconsistent preexisting provision of a law or treaty of the United States").

1. **The NPRM's Proposals Violate The ITU Regulations' Cornerstone Requirement That International Settlement Rates Be Determined And Settled According To Mutual Agreement Between Carriers**

The ITU Regulations state repeatedly that international settlement rates will be determined and settled exclusively by mutual agreement between carriers.

- "For each applicable service in a given relation, administrations [or recognized private operating agency(ies) ("RPOAs"))] **shall by mutual agreement establish and revise accounting rates** to be applied between them^{44/}
- "[T]he provision and operation of international telecommunications services in each relation is pursuant to **mutual agreement between administrations [or recognized private operating agency(ies) ("RPOAs"))]**."^{45/}

The ITU Regulations therefore recognize and protect the right of carriers to establish international settlement rates by mutual agreement. They provide no role for national governments or their regulatory agencies in the establishment or operation of these carrier-to-carrier agreements.

The court in the RCA Settlements Case recognized that where the United States is a party to an international agreement that governs a communications service, the Commission is without power to regulate that service in a manner inconsistent with the international agreement.^{46/} In the present case, the United States

^{44/} ITU Regulations, App. 1, § 1.1 (emphasis added).

^{45/} Id., art. 1.5 (emphasis added). See also ITU-T Recommendation D.140: Accounting Rates Principles for International Telephone Services; Annex C: Guidelines for bilateral negotiation of accounting rates and accounting rate shares in international telephone service, § C.2.1 (1992, rev. 1995) ("Accounting rates and accounting rate shares are established and revised through bilateral agreement."); Dr. Pekka Tarjanne, Americas Geopolitical Challenges: Trade in telecom services (speech delivered at Rio de Janeiro, June 10, 1996) <http://www.itu.int/speeches/tarjanne/rio1_10_06_96.htm> ("accounting rates . . . are agreed bilaterally between PTOs").

^{46/} See Part II.A.2.b.(2) above.

is a party to the International Telecommunications Convention and Regulations, which give only the carriers themselves the authority to set settlement rates through mutual agreements. The Commission is required to respect these agreements and is barred from taking "enforcement actions" contrary to the terms of these treaties.

2. The NPRM's Proposals Violate The Prompt Payment Requirements Of The ITU Regulations

The ITU Regulations require prompt payment of balances of account pursuant to carrier-to-carrier agreements, regardless of disputes. "Payment of balances of account shall be effected as promptly as possible, but in no case later than two calendar months after the day on which the settlement statement is despatched [sic] by the creditor administration."^{47/} Carriers must make prompt international settlement payments even in the event of a pending dispute. "The payment due on a settlement statement **shall not be delayed pending settlement of a query on that account**. Adjustments which are later agreed shall be included in a subsequent account."^{48/}

The NPRM proposes to enforce the United States' settlement regime against foreign carriers by precluding prompt account balance payments pursuant to carrier-to-carrier agreements.^{49/} The NPRM's proposals would therefore clearly violate the ITU Regulations' prompt payment requirements by obliging U.S. carriers to breach their agreements with foreign carriers.

^{47/} ITU Regulations, App. 1, § 3.3.1 (footnote omitted).

^{48/} Id., App. 1, § 3.3.2 (emphasis added).

^{49/} NPRM ¶¶ 89, 90.

3. As A Unilateral Attempt To Resolve A Dispute Over International Settlement Rates, The NPRM Violates The Dispute Resolution Provisions Of The ITU Convention

AT&T would also have the Commission ignore the ITU Convention's dispute resolution obligations, which are binding on the United States. The ITU Convention provides:

Members may settle their disputes on questions relating to the interpretation or application of this Convention or of the Regulations contemplated in Article 42, through diplomatic channels, or according to procedures established by bilateral or multilateral treaties concluded between them for the settlement of international disputes, or by any other method mutually agreed upon.^{50/}

The ITU Convention does not permit a contracting party such as the United States to take unilateral, punitive action against carriers or other contracting parties for matters governed by the ITU Convention and ITU Regulations. Even if the United States were to claim, as the NPRM insinuates, that foreign carriers have breached their obligations under the ITU Convention, Regulations, or Recommendations, it would be obligated to resolve the dispute in a manner mandated by the ITU Convention.^{51/}

If the United States disagrees with other ITU members (or the carriers in their countries) as to the interpretation and application of the provisions of the ITU

^{50/} ITU Convention, art. 50(1). The question of which entities may arbitrate a dispute is to be determined by the parties. *See id.* art. 82(2) ("The parties shall decide by agreement whether the arbitration is to be entrusted to individuals, administrations or governments. If within one month after notice of submission of the dispute to arbitration, the parties have been unable to agree upon this point, the arbitration shall be entrusted to governments.").

^{51/} The NPRM suggests that foreign carriers have not abided by their obligations under the ITU Regulations or heeded the ITU Recommendations to take costs into account in setting traffic termination prices. *See* NPRM ¶¶ 1, 23. As discussed in Part III.A. below, however, the substantial decreases in settlement rates and increasing alignment with termination costs over the past five years demonstrate that foreign carriers **have** complied with the ITU Regulations to reflect declining costs in settlement rates.